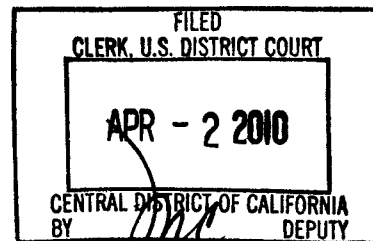


I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

DATED April 2, 2010
Theresa Lash
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

ROBERT CASTRO,
Petitioner,
v.
K. HARRINGTON, Warden,
Respondent.

Case No. EDCV 10-00427 DSF (AN)

**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the court is a petition for writ of habeas corpus ("Petition") brought by Robert Castro ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises five claims directed at Petitioner's September 11, 1995 conviction of four counts of attempted first degree murder and one count of conspiracy that he sustained in the California Superior Court for Riverside County (case no. CR57414). For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

///

///

II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court, because the Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. § 2244(d)(1); *see Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitations period begins to run from “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

///

///

///

1 The face of the Petition and relevant state court records^{1/} establish the following
 2 relevant facts. Petitioner sustained his underlying conviction on September 11, 1995,
 3 and was sentenced on November 9, 1995. (Pet. at 3.^{2/}) The California Court of
 4 Appeal, Fourth Appellate District, Division Two, affirmed the judgment on direct
 5 appeal on October 21, 1997 (case no. E017457), and the California Supreme Court
 6 denied review of that decision on January 28, 1998. (Pet. at 3-4; state court records.)
 7 Petitioner never filed a petition for certiorari with the United States Supreme Court.
 8 Therefore, for purposes of AEDPA's limitations period, Petitioner's judgment became
 9 final on April 28, 1998, the ninetieth day after the state high court denied his petition
 10 for review and the last date for him to file a petition for certiorari with the Supreme
 11 Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). The statute of limitations
 12 then started to run the next day, April 29, 1998, and ended a year later on April 28,
 13 1999. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v. Stewart*, 251 F.3d 1243, 1245-
 14 47 (9th Cir. 2001) (the limitations period begins to run on the day after the triggering
 15 event pursuant to Fed. R. Civ. P. 6(a)). Petitioner did not constructively file his
 16 pending Petition until March 10, 2010^{3/} -- 3,969 days (nearly 11 years) after the

18 ^{1/} The court takes judicial notice of Petitioner's records in the superior court,
 19 which are available on the Internet at <http://public-access.riverside.courts.ca.gov>, and
 20 in the state appellate courts, which are available on the Internet at
 21 <http://appellatecases.courtinfo.ca.gov> ("state court records"). *See Smith v. Duncan*,
 22 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of relevant
 state court records in federal habeas proceedings).

23 ^{2/} Petitioner did not use the court's approved petition form, failed to
 24 consecutively number the pages of the Petition as required by Local Rule 11-3.3,
 25 and failed to file mandatory court copies that are signed and dated. For sake of clarity,
 26 the court shall cite pages of the Petition by referring to the electronic pagination
 furnished by the court's official CM-ECF electronic document filing system.

27 ^{3/} Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is
 28 deemed to be filed on the date the prisoner delivers the petition to prison authorities
 (continued...)

1 expiration of the limitations period.

2 Accordingly, absent some basis for tolling or an alternative start date to
3 AEDPA's limitations period under 28 U.S.C. § 2244(d)(1), the pending Petition is
4 time-barred.

5 **C. Statutory Tolling**

6 AEDPA includes a statutory tolling provision that suspends the limitations
7 period for the time during which a "properly-filed" application for post-conviction or
8 other collateral review is "pending" in state court. 28 U.S.C. § 2244(d)(2); *Waldrip*
9 *v. Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th
10 Cir. 2005). An application is "pending" until it has achieved final resolution through
11 the state's post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.
12 2134 (2002). The limitations period is not tolled between the time a final decision is
13 issued on direct state appeal and the time a state collateral challenge is filed because
14 there is no case "pending" during that interval. *Thorson v. Palmer*, 479 F.3d 643, 646
15 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). On collateral
16 review, however, "intervals between a lower court decision and a filing of a new
17 petition in a higher court," when reasonable, fall "within the scope of the statutory
18

19 ^{3/} (...continued)

20 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
21 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The pending Petition
22 was filed on March 23, 2010. (Pet. at 1.) The Petition states it was signed and dated
23 by Petitioner on March 10, 2010, however, the attached proof of service was signed
24 and dated by Petitioner on March 8, 2010. Because it would have been impossible for
25 Petitioner to have signed the Petition on March 10, 2010, if he had mailed it to the
26 clerk's office on March 8, 2010, it is presumed that Petitioner signed the proof of
27 service before he signed the Petition and then inadvertently failed to make the
28 corresponding correction to the proof of service. Regardless, for purposes of the
timeliness analysis, the court gives Petitioner the benefit of doubt by construing the
Petition as being constructively filed on March 10, 2010, which is the earliest date he
could have signed the Petition and delivered it to prison officials for mailing to the
clerk's office.

1 word ‘pending’” thus tolling the limitations period. *Saffold*, 536 U.S. at 221, 223;
2 *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006) (citing *Saffold*).

3 Further, to qualify for statutory tolling during the time the petitioner is pursuing
4 collateral review in the state courts, his *first* state habeas petition must be
5 constructively filed *before*, not after, the expiration of AEDPA’s one-year limitations
6 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2254
7 does not permit the reinitiation of the limitation period that has ended before the state
8 petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001); *Webster v.*
9 *Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court petition [] that is filed
10 following the expiration of the limitations period cannot toll that period because there
11 is no period remaining to be tolled”).

12 The Petition and relevant state court records establish Petitioner is not entitled
13 to any statutory tolling of the limitations period because he did not file any state
14 habeas petitions.

15 **D. Alternative Start of the Statute of Limitations**

16 **1. State-Created Impediment**

17 In rare instances, AEDPA provides that its one-year limitations period shall run
18 from “the date on which the impediment to filing an application created by State action
19 in violation of the Constitution or laws of the United States is removed, if the
20 applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B).
21 Asserting that the statute of limitations was delayed by a state-created impediment
22 requires establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th
23 Cir. 2002). Thus, a claim under this provision “must satisfy a far higher bar than that
24 for equitable tolling.” *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009).
25 Petitioner’s filings do not set forth any facts that show he is entitled to relief under this
26 provision.

27 **2. Newly Recognized Constitutional Right**

28 AEDPA provides that, if a claim is based upon a constitutional right that is

1 newly recognized and applied retroactively to habeas cases by the United States
2 Supreme Court, the one-year limitations period begins to run on the date which the
3 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).
4 Petitioner's filings do not set forth any facts that show he is entitled to relief under this
5 provision.

6 **3. Discovery of Factual Predicate**

7 AEDPA also provides that, in certain cases, its one-year limitations period shall
8 run from "the date on which the factual predicate of the claim or claims presented
9 could have been discovered through the exercise of due diligence." 28 U.S.C. §
10 2244(d)(1)(D); *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). Petitioner's
11 filings do not set forth any facts that show Petitioner is entitled to an alternate start
12 date to the limitations period based upon the late discovery of the factual predicate.

13 **E. Equitable Tolling**

14 The United States Supreme Court has not yet decided whether AEDPA's
15 limitations period allows for equitable tolling but it has assumed without deciding that
16 it is available where the parties have agreed. *Lawrence v. Florida*, 549 U.S. 327, 336,
17 127 S. Ct. 1079 (2007) ("We have not yet decided whether § 2244(d) allows for
18 equitable tolling."); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005)
19 ("We have never squarely addressed the question whether equitable tolling is
20 applicable to AEDPA's statute of limitations").

21 Although the Ninth Circuit has found that equitable tolling is available, *Harris*
22 *v. Carter*, 515 F.3d 1051, 1054 n.4. (9th Cir. 2008), it has cautioned, "[e]quitable
23 tolling is justified in few cases," and that "the threshold necessary to trigger equitable
24 tolling [under AEDPA] is very high, lest the exceptions swallow the rule." *Spitsyn v.*
25 *Moore*, 345 F.3d 796, 799 (9th Cir. 2003); *Miranda v. Castro*, 292 F.3d 1063, 1066
26 (9th Cir. 2002) (same). "This high bar is necessary to effectuate the 'AEDPA's
27 statutory purpose of encouraging prompt filings in federal court in order to protect the
28 federal system from being forced to hear stale claims.'" *Mendoza v. Carey*, 449 F.3d

1 1065, 1068 (9th Cir. 2006). Further, “[e]quitable tolling determinations are ‘highly
2 fact-dependent.’” *Id.* The petitioner “bears the burden of showing that equitable
3 tolling is appropriate.” *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th
4 Cir. 2005).

5 Moreover, in *Pace*, the Supreme Court clearly established that “a litigant
6 seeking equitable tolling bears the burden of establishing two elements: (1) that he
7 has been pursuing his rights diligently, and (2) that some extraordinary circumstance
8 stood in his way.” *Pace*, 544 U.S. at 418; *Lawrence*, 549 U.S. at 336. *Pace*’s
9 diligence prong requires the petitioner to show he engaged in reasonably diligent
10 efforts to file his § 2254 petition throughout the time the limitations period was
11 running. *Mendoza*, 449 F.3d at 1070; *see also Smith v. McGinnis*, 208 F.3d 13, 17 (2d
12 Cir. 2000) (stating that equitable tolling requires a showing that “the party seeking
13 equitable tolling must have acted with reasonable diligence throughout the period he
14 seeks to toll” and “extraordinary circumstances prevented him from filing his petition
15 on time”). The petitioner must also demonstrate that he exercised reasonable diligence
16 in attempting to file his habeas petition after the extraordinary circumstances began
17 otherwise the “link of causation between the extraordinary circumstances and the
18 failure to file [is] broken.” *Spitsyn*, 345 F.3d at 802. *Pace*’s “extraordinary
19 circumstances” prong requires the petitioner to “additionally show that the
20 extraordinary circumstances were the cause of his untimeliness, and that the
21 extraordinary circumstances made it impossible to file a petition on time.” *Ramirez*,
22 571 F.3d at 997 (internal quotations and citations omitted). Petitioner’s filings do not
23 set forth any facts that show he is entitled to equitable tolling.

24 ORDER

25 Based on the foregoing, the court finds the Petition is untimely. Accordingly,
26 Petitioner shall have until **April 23, 2010**, to file a written response and show cause
27 why his Petition should not be dismissed with prejudice because it is time-barred. In
28 responding to this Order, Petitioner must show by declaration and any exhibits what,

1 if any, factual or legal basis he has for claiming that the court's foregoing analysis is
2 factually or legally incorrect, or that AEDPA's one-year statute of limitations should
3 be tolled, or the start date extended. If Petitioner contends he is entitled to tolling
4 because of a lack of access to the prison law library due to a purported lockdown or
5 some other state-created impediment, his written response must be supported by a
6 declaration from the warden or prison librarian verifying that the law library and
7 library materials were unavailable throughout the relevant time period because of the
8 lockdown or other stated reason. Further, Petitioner must demonstrate that, during the
9 time access to the prison law library was allegedly unavailable, he made requests for
10 legal materials to be brought to his cell and those requests were denied.

11 **Petitioner is warned that if a timely response to this Order is not made,**
12 **Petitioner will waive his right to do so and the court will, without further notice,**
13 **issue an order dismissing the Petition, with prejudice, as time-barred. Further,**
14 **if Petitioner determines the court's above analysis is correct and the Petition is**
15 **clearly time-barred, he should consider filing a Request For Voluntary Dismissal**
16 **of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this**
17 **Order.**

18
19 IT IS SO ORDERED.

20
21
22 DATED: April 2, 2010

23 
24 ARTHUR NAKAZATO
25 UNITED STATES MAGISTRATE JUDGE
26
27
28